

**IC 4-2-6-6 Compensation resulting from confidential information
42 IAC 1-5-6 Conflicts of Interest (IC 4-2-6-9)
42 IAC 1-5-14 Post-Employment (IC 4-2-6-11)**

The Associate Director of Administrative Services for the Indiana Family Social Services Administration sought advice regarding a post-employment opportunity with a group that contracts with FSSA. The Commission finds that the post-employment opportunity would not violate the post-employment restrictions.

May 13, 2021
2021-FAO-006

The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) is requesting an advisory opinion on behalf of the Associate Director of Administrative Services with FSSA's Vocational Rehabilitation (VR) services program (Associate Director).

In their role, the Associate Director oversees the case management system, Aware, which has thirteen interconnected interfaces. The Associate Director also assists with business process writing, federal reporting, fiscal budgeting and data analysis.

The Associate Director plans to move out of state on or about May 16, 2021, and they cannot remain in state employment in their current role. Public Consulting Group, Inc. (PCG) approached the Associate Director's supervisor regarding an opportunity for employment after learning that the Associate Director was relocating, and the Associate Director's supervisor advised them of the opportunity. The Associate Director then reached out to a contact they knew with PCG through a launch meeting regarding the opportunity on or about March 18, 2021, and formally sent their resume to PCG on March 26, 2021. The Associate Director interviewed with PCG on March 31, 2021. PCG offered the Associate Director the role of consultant on or about April 13, 2021.

The opportunities and projects on which PCG would like the Associate Director to work include the following:

- Supporting the development of a new quality assurance program for a state VR agency client;
- Comprehensive Statewide Needs Assessment (CSNA) report development for three current state VR agency clients;
- Provider services rate setting for a VR state agency client;
- Supporting business development efforts with VR state agencies; and
- Maintaining market visibility with national associations and conferences.

None of these projects involve Indiana programs. PCG advised they have no current need to assign the Associate Director to any Indiana related projects or initiatives.

PCG assists mostly public sector services relating to health, education and human services relating to performance and processes. PCG has thirty-eight locations with approximately one thousand open contracts and works with all fifty states and international providers. PCG contracts with Indiana and FSSA, and presently, there are thirty-three total active contracts between the State and PCG.

PCG contracted with FSSA's Division of Disability and Rehabilitative Services (DDRS) to develop and implement a VR Claims payment system for vendors to submit claims via the web and provide fiscal services to those vendors by making timely payments for the services provided to VR program participants. Another FSSA employee administers the PCG claims contract for FSSA's VR Program. The Associate Director oversees the Aware contract, which is a case management system. Aware is a separate contract, but some interfaces of Aware work with PCG and claims processing. The State also contracts with PCG through DDRS for PCG to provide pre-employment transition services. The Associate Director did not oversee, manage, procure or have other involvement with this pre-employment transition services contract.

The Associate Director has been involved in approximately thirty telephone calls regarding Aware's Claims Payment System processes, issues and information gathering for projects. The Associate Director participated in those calls as the subject matter expert for the interconnected case management interfaces, and many calls included all interface stakeholders. The Associate Director did not lead or organize these calls. Another employee has always been the liaison with PCG regarding the claims processing system, and the Associate Director does not have contracting responsibility for FSSA. The Associate Director also has not made a regulatory or licensing decision that directly applied to PCG or to a parent or subsidiary of PCG through their current role with FSSA's VR Program.

FSSA's VR Program has applied for a grant project with PCG that would begin in October 2021. The Associate Director was not a key point of contact for the PCG grant application. Several stakeholders, both internal and external, and state employees gathered and prepared information for the grant application submission. Participants included people from at least seven teams or groups. The Associate Director's responsibilities were limited to pulling data and participating in no more than two telephone calls regarding the grant. The grant will not be awarded until July or August 2021.

The Associate Director's employment with PCG is not contingent upon their working on the grant project if FSSA's VR Program is awarded the grant, but they is interested in a determination regarding whether they would be able to work on the grant if FSSA's VR Program is a grant recipient.

If they accept the role of consultant with PCG, the Associate Director is not aware of any intentions for their to work on any projects or contracts with FSSA. Rather, the Associate Director will be analyzing data regarding substance abuse for PCG, and although they may assess information and data for states with contracts with PCG, the Associate Director does not

believe that they would be analyzing data for Indiana or submitting claims to Indiana. To the Associate Director's best information and belief, no executive branch lobbying is associated with the role of consultant, nor is that the business of PCG.

The Associate Director understands that they may not participate in any decision or vote, or matter relating to any decision or vote, for FSSA related to PCG due to their negotiations concerning prospective employment. The Associate Director filed a disclosure form on April 22, 2021, screening them from participating in any votes, decisions or other matters where PCG may have a financial interest. The Associate Director also understands that they may not benefit from or divulge confidential information except as permitted by law.

FSSA is seeking the Commission's opinion regarding the application of any of the rules in the Code to the Associate Director's post-employment opportunity with PCG.

ISSUE

What rules in the Code apply to the Associate Director's post-employment opportunity with PCG?

RELEVANT LAW

IC 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter related to that decision or vote, if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a member, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and ethics officer in writing and do either of the following:

(1) Seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(A) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(B) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(2) File a written disclosure statement with the commission that:

(A) details the conflict of interest;

(B) describes and affirms the implementation of a screen established by the ethics officer;

(C) is signed by both:

(i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and

(ii) the agency ethics officer;

(D) includes a copy of the disclosure provided to the appointing authority; and

(E) is filed no later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

(c) A written determination under subsection (b)(1)(B) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(1)(B) shall be filed with the appointing authority.

IC 4-2-6-11 (42 IAC 1-5-14)

One year restriction on certain employment or representation; advisory opinion; exceptions; waivers; disclosure statements; restrictions on inspector general seeking state office

Sec. 11. (a) As used in this section, "particular matter" means any of the following:

(1) An application.

(2) A business transaction.

(3) A claim.

(4) A contract.

(5) A determination.

(6) An enforcement proceeding.

(7) An investigation.

(8) A judicial proceeding.

(9) A lawsuit.

(10) A license.

(11) An economic development project.

(12) A public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;
- (2) from an employer if the former state officer, employee, or special state appointee was:
 - (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
 - (B) in a position to make a discretionary decision affecting the:
 - (i) outcome of the negotiation; or
 - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;
before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.

(c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.

(d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:

- (1) employment; or
- (2) compensation;

is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of the individual's duties or responsibilities while a state officer, an employee, or a special state appointee.

(e) A written advisory opinion issued by the commission certifying that:

- (1) employment of;
- (2) consultation by;
- (3) representation by; or
- (4) assistance from;

the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.

(f) Subsection (b) does not apply to the following:

- (1) A special state appointee who serves only as a member of an advisory body.
- (2) A former state officer, employee, or special state appointee who has:
 - (A) not negotiated or administered any contracts with that employer in the two (2) years before the beginning of employment or consulting negotiations with that employer; and
 - (B) any contract that:

- (i) the former state officer, employee, or special state appointee may have negotiated or administered before the two (2) years preceding the beginning of employment or consulting negotiations; and
- (ii) is no longer active.

(g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. A waiver must satisfy all of the following:

- (1) The waiver must be signed by an employee's or a special state appointee's:
 - (A) state officer or appointing authority authorizing the waiver; and
 - (B) agency ethics officer attesting to form.
- (2) The waiver must include the following information:
 - (A) Whether the employee's prior job duties involved substantial decision making authority over policies, rules, or contracts.
 - (B) The nature of the duties to be performed by the employee for the prospective employer.
 - (C) Whether the prospective employment is likely to involve substantial contact with the employee's former agency and the extent to which any such contact is likely to involve matters where the agency has the discretion to make decisions based on the work product of the employee.
 - (D) Whether the prospective employment may be beneficial to the state or the public, specifically stating how the intended employment is consistent with the public interest.
 - (E) The extent of economic hardship to the employee if the request for a waiver is denied.
- (3) The waiver must be filed with and presented to the commission by the state officer or appointing authority authorizing the waiver.
- (4) The waiver must be limited to an employee or a special state appointee who obtains the waiver before engaging in the conduct that would give rise to a violation of subsection (b) or (c).

The commission may conduct an administrative review of a waiver and approve a waiver only if the commission is satisfied that the information provided under subdivision (2) is specifically and satisfactorily articulated. The inspector general may adopt rules under IC 4-22-2 to establish criteria for post employment waivers.

(h) Subsection (b) applies, subject to waiver under subsection (g), to a former state officer, employee, or special state appointee who:

- (1) made decisions as an administrative law judge; or
- (2) presided over information gathering or order drafting proceedings;

that directly applied to the employer or to a parent or subsidiary of the employer in a material manner.

(i) A former state officer, employee, or special state appointee who forms a sole proprietorship or a professional practice and engages in a business relationship with an entity that would otherwise violate this section must file a disclosure statement with the commission not later than one hundred eighty (180) days after separation from state service. The disclosure must:

- (1) be signed by the former state officer, employee, or special state appointee;
- (2) certify that the former state officer, employee, or special state appointee is not an employee of the entity; and
- (3) state in detail the treatment of taxes, insurance, and any other benefits between the entity and the former state officer, employee, or state appointee.

(j) The inspector general may not seek a state elected office before the elapse of at least three hundred sixty-five (365) days after leaving the inspector general position.

ANALYSIS

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Confidential Information, Conflicts of Interests and Post-employment. The application of each provision to the Associate Director is analyzed below.

A. Confidential Information

IC 4-2-6-6 prohibits the Associate Director from accepting any compensation from any employment, transaction or investment that was entered into or made as a result of material information of a confidential nature. So long as any compensation the Associate Director receives does not result from confidential information, their potential employment with PCG would not violate IC 4-2-6-6.

B. Conflict of Interests

IC 4-2-6-9(a)(1) prohibits the Associate Director from participating in any decision or vote, or matter related to that decision or vote, if they have a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(4) prohibits them from participating in any decision or vote, or matter related to that decision or vote, in which a person or organization with whom they are negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in IC 4-2-6-1(a)(11) includes, "an interest arising from employment or prospective employment for which negotiations have begun."

In this case, employment negotiations have already begun. Accordingly, the Associate Director would be prohibited from participating in any decision or vote, or matter related to a decision or vote, in which the Associate Director, by virtue of their employment negotiations with PCG, or PCG would have a financial interest in the outcome of the matter.

Based on the information provided, it appears that a potential conflict of interests was identified. IC 4-2-6-9(b) requires that a state employee who identifies a potential conflict of interests notify their agency's appointing authority and ethics officer and either (1) seek a formal advisory opinion from the Commission; or (2) file a written disclosure form with the Office of Inspector General (OIG).

The Associate Director, with the Ethics Officer's assistance, filed the disclosure form with the OIG on April 22, 2021. The disclosure included the notification to FSSA's appointing authority and included a description of the screen that FSSA implemented to ensure that the Associate Director does not participate in any votes, decisions or other matters in which PCG may have a financial interest.

Accordingly, the disclosure requirements under IC 4-2-6-9(b) have been satisfied; however, the Associate Director must ensure they continue to refrain from participating in any decisions or votes, or matters relating to any such decisions or votes, in which they or PCG has a financial interest in the outcome of the matter for the remainder of their state employment.

C. Post-Employment

IC 4-2-6-11 consists of two separate limitations: a “cooling off” period and a “particular matter” restriction. The first prohibition, commonly referred to as the cooling off or revolving door period, prevents the Associate Director from accepting employment from an employer for 365 days from the date that they leave state employment under various circumstances.

First, the Associate Director is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. A lobbyist is defined as an individual who seeks to influence decision making of an agency and who is registered as an executive branch lobbyist under the rules adopted by the Indiana Department of Administration.

Based on the information provided, the Associate Director would not be engaging in any lobbying activities in their prospective employment with PCG. To the extent that the Associate Director does not engage in executive branch lobbying for one year after leaving state employment, their intended employment with PCG would not violate this provision of the post-employment rule.

Second, the Associate Director is prohibited from accepting employment for 365 days from the last day of their state employment from an employer with whom 1) they engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract.

PCG has an active contract with FSSA’s VR Program, of which the Associate Director is a part. They have overseen the case management system that has interfaces with PCG through the Claims Repayment System and has been a participant on calls on which all interface stakeholders were included; however, their involvement in these discussions was as an Aware subject matter expert, and they have had no involvement in the contract creation, execution or administration of PCG’s contract. Instead, a different FSSA employee handles the contract.

Accordingly, the Commission finds that the Associate Director would not be subject to the cooling off restriction for their role in interacting with PCG through calls regarding the case management system they oversee as part of FSSA’s VR Program’s claims processing system because they were not involved in the negotiation or administration of PCG’s contract with FSSA.

Third, the Associate Director is prohibited from accepting employment for 365 days from the last day of their state employment from an employer for whom they made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary.

The Ethics Officer provides that the Associate Director has not made any regulatory or licensing decisions in their position with FSSA that directly applied to PCG or to a parent or subsidiary of PCG in their role with FSSA's VR Program. Accordingly, the Commission finds that this provision of the cooling off restriction would not apply to their prospective position with PCG.

Fourth, the Associate Director is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence them in their official capacity as a state employee. The information presented to the Commission does not suggest that PCG has extended an offer of employment to the Associate Director in an attempt to influence them in their capacity as a state employee. Accordingly, the Commission finds that this restriction would not apply to their intended employment opportunity with PCG.

Finally, the Associate Director is subject to the post-employment rule's "particular matter" prohibition in their prospective post-employment. This restriction prevents them from representing or assisting a person on any of the following twelve matters if they personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite.

In this instance, the Associate Director would be prohibited from representing or assisting PCG, as well as any other person, in a particular matter in which they personally and substantially participated as a state employee.

The Ethics Officer provides that FSSA's VR Program has applied for a grant project with PCG that would begin in October 2021. The Associate Director was not a key point of contact for the PCG grant application, but they were a member of a group of stakeholders, including state employees from a number of different groups/teams, who gathered and prepared information for the grant application. The Associate Director's participation in this process was limited to pulling data and participating in no more than two telephone calls regarding the grant.

Based on the information provided by the Ethics Officer, the Commission finds that the Associate Director's participation in the application was not personal and substantial. Accordingly, the particular matter restriction would not apply to the Associate Director and they would be permitted to participate in the grant application and the potential resulting grant project for their new employer.

The Associate Director should also keep in mind that they are prohibited from assisting PCG or any other person on any of the other particular matters listed above on which they may have personally and substantially worked during their state employment regardless of whether it involves PCG.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Associate Director's post-employment opportunity with PCG would not violate the post-employment restrictions found in IC 4-2-6-11.